

8

518. h. 11

8

FREE and CANDID
DISQUISITIONS,
ON THE
NATURE *and* EXECUTION
OF THE
LAWS of ENGLAND,
BOTH IN
CIVIL and CRIMINAL AFFAIRS.

Wherein the End of Laws in general, and how far our Laws are agreeable, or opposite thereto, is impartially considered; the present Inconveniencies attending the municipal Laws of this Country, both as to Theory and Practice, are freely examined, and some Methods are proposed to make them more useful to the Public, and more easy to the Subject.

WITH A
POSTSCRIPT relating to Spirituous Liquors, and the Execution of the present Excise Laws.

Salus Populi Suprema Lex esto. Cic. de Leg. l. iii. c. 3.

By JOSHUA FITZSIMMONDS, *Esq;*
BARRISTER at Law.

L O N D O N :

Printed for M. SHEEPEY, Bookfeller and Publisher
under the Royal-Exchange, Cernhill. M. DCC. LI.
[Price One Shilling.]

THE
DISQUISITION

ON THE
NATURE AND EXTENT

OF THE
LAW OF EVIDENCE

BY
JAMES W. WALKER

OF THE
FEDERAL COURT OF THE DISTRICT OF COLUMBIA
AND
OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA
IN THE
CASE OF THE DISTRICT OF COLUMBIA
V. THE DISTRICT OF COLUMBIA

POSTSCRIPT
TO THE EDITION OF 1854

NEW YORK
PUBLISHED BY
J. WALKER

LONDON
PUBLISHED BY
J. WALKER



TO THE
RIGHT HONOURABLE

ARTHUR ONSLOW, Esq;

SPEAKER of the House of Commons.

PERMIT me, Sir, tho' absolutely unknown to you, to commend the following Sheets to your powerful Protection, which I know I must only expect, in case, upon Perusal, they appear to deserve it. •

The only Excuse I can offer for presuming to dedicate this Treatise to you is, that I wrote it with a sincere Desire to promote the Happiness of my Country, and that it is upon a Subject peculiarly adapted to the public Character, which you so worthily sustain.

Custom,

Custom, which rendered such an Address in some measure necessary, might have also warranted my entering into a more particular Display of those many public and private Virtues, which strict Justice, and the general Voice, would have confirmed ; but as it was not my Design to give you that Pain, which real Merit always feels, in the public and fulsome Repetition of its Graces, I shall take the Liberty to conclude with subscribing myself,

S I R,

Your most Obedient,

humble Servant.

The AUTHOR.



FREE and CANDID
DISQUISITIONS,
 ON THE
 NATURE *and* EXECUTION
 OF THE
 LAWS of *ENGLAND*, &c.

ALL Laws have their Original and Foundation in the Reason and Nature of Things, and those various Relations, which intelligent Beings stand in to their Creator, and their Fellow-Creatures: * and all written or civil Laws, as they are from thence

* Erat enim ratio profecta a rerum natura, & ad recte faciendum impellens, & a delicto revocans, quæ non tum denique incipit lex esse, quum scripta est, sed tum quum orta est. Cic. *de leg.* l. 2, c. 4.

derived, ought to be conformable to that great Rule, and Standard of Morality to the human Species, which was prior to them, and the Source from whence they flow * : and as the Law of Reason prescribes the proper means of Happiness ; so the Superstructure, political Laws, should be calculated to confirm the Peace and Welfare of Mankind, of Kingdoms, of lesser Societies, and of each Individual, and the more the municipal or civil Laws of any particular Country appear to be conformable to that general Rule, and productive of those desirable Ends, the better and more pure they are, and the more happy the People that are governed by them. But as it will sometimes happen, through the Imperfection of the present State of Mortality, the Errors of Mankind, and the common Accidents of Life, that those Laws which are beneficial to the Community in general, are nevertheless, in some Respects, detrimental to the private Interest of one or more of its Subjects, considered as Individuals, a lesser Evil (if it can be called such) must be permitted, in order that a greater Good may not be prevented ; and in all such Cases, the private Advantage of the Individual, should give way to the Interest of the Public ; and by parity of Reason, Laws which would be beneficial to Particulars, but hurtful to the whole Society ought never to be enacted.

* Constituendi vero juris ab illa summa lege capiamus exordium, quæ seculis omnibus ante nata est, quam scripta lex ulla, aut quam omnino civitas constituta. *Ibid.* l. 1. c. 6.

All municipal Laws are more particularly relative to that Country in which they prevail, and many of them are suited to some Circumstances, either of Situation, Trade, Disposition, and Temper of the Inhabitants, or some other local Peculiarities, which confine their Propriety to that particular People which they are intended to regulate : and many of them are adapted to the Exigence of the Times, and can therefore be only temporary.* Nay, *all* civil Laws must be mutable, if they are agreeable to the first Proposition that I laid down, that the Reason and Nature of Things is the Basis of all Law ; or if they are calculated to answer those Ends, for which, I have already said, all municipal Laws ought to be designed ; for no one Law can be uniformly and constantly, either rational or useful, where there is a Change in the Relations or Circumstances of those Beings to which it refers, in that particular Point to which its Influence is to tend : and as there are no States or public Bodies, which, either as to the Dispositions of the Individuals which compose them, the Trade they carry on, or the Occurrences which happen among them, can always subsist under the same Circumstances ; Municipal Laws must be in their own Nature changeable, and vary as the Exigencies of the State require : There must, therefore, in all States a Power be vested in some Part or other of

* Omnes populi qui legibus & moribus reguntur, partim suo proprio, partim communi omnium jure utuntur, DIG. lib. 1. Tit. 1.

the Community, to alter or amend, or disannul those Laws, which were at first good, but by Time, and the Mutability of human Affairs, are become hurtful or useless * ; and the not exerting that Power upon proper Occasions must be very detrimental to the Public.

At the same Time that the Laws are calculated for the public Good of the Society, they should be as little hurtful as possible to the private Interest of the Individuals therein. And as every Subject or Member of a Community has, as long as he acts consistently with his Duty to the State, not only from the Laws of Nature, but by the express Warranty of Society, into which Mankind at first entered for the better Defence of their Persons and Properties, a Right to his Life, and Peace and Quiet, and also to that Property which his own Labour, Study, or Invention, has procured him, or which the Regard or Affection of a Fellow-Citizen has invested him with, it must be a necessary Quality of all equitable Laws, that they themselves do not warrant or direct the taking away Life or Property, but when the Necessities of the whole Community demand it †.

* Ea [jura] vero, quæ ipsa sibi quæque civitas constituit, sæpe mutari solent, vel tacito consensu populi, vel alia postea lege lata. *Instit. lib. 1. Tit. 2. Sect. 11.*

† Constat profecto ad salutem civium, civitatumque incolumitatem, vitamque hominum quietam & beatam, inventas esse leges, eosque, qui primum ejusmodi scita sanxerint, populis ostendisse ea se scripturos atque laturos, quibus illi adscriptis susceptisque honeste beateque viverent. *Cic. deleg. lib. ii. c. 11.*
And

And in order to make them useful, as well as barely equitable, the Laws should be so framed as to defend the Subject as much as possible against any lawless Attempts either upon his Person or Goods, and secure him in the Defence of the one, and Recovery of the other, with as much Ease and Speed, and as little Expence to him as may be. It is from the same Principle of Reasoning, that he, who has broke through the Restraints of Justice and Equity, as well as the Laws of the State, ought by no Means to have, by Virtue of the Laws themselves, or any Deficiency or Inconvenience in their Execution, an Advantage over a well behaved Subject, who seeks for Justice; for this would be rewarding Injustice, and oppressing Honesty, and thereby making Law oppose the very End of its taking place. And as human Nature is frail and liable to err, the Laws ought not to be too severe upon the Erroneous, so as to punish beyond, or without a profitable End to the State or the Individual.

There is a Passage in the celebrated *Puffendorf's* Treatise on the Laws of Nature and Nations *, backed by the Authority of a celebrated *Grecian* Orator, which is so full and express to my Purpose, that I shall take the Liberty to transcribe it at length. “ It is of singular Service to
“ a State, to have a System of just, plain, and

* Lib. vii. c. 9.

“ perspicuous Laws, for the settling of such Affairs
 “ as the Subjects are most frequently concerned
 “ in with one another, and suitable to the Con-
 “ dition and Genius of the People they are
 “ prescribed for. It is the Advice of *Isocrates* to
 “ a young Prince, to seek such Laws in general
 “ as are equitable and useful, such as may render
 “ the Differences among Subjects, as few as pos-
 “ sible, and the Accommodation of them no
 “ less easy and expeditious. Good Laws are few
 “ in Number, yet satisfactory and intelligible to
 “ those who are to use them; just, profitable,
 “ and consistent with each other. It ought to be
 “ a settled Rule not to make more Laws than
 “ conduce to the Good of the Subject and the
 “ State; for by not observing this Rule, the Go-
 “ vernment may bring the People under an un-
 “ necessary Inconvenience, which is contrary to
 “ the original Design of civil States; and the or-
 “ dinary Form and Course of Justice ought to be
 “ fixed in such a Manner, as that every Subject
 “ may recover his Right by as short and as cheap
 “ a Process as can be contrived.”

As every Member of Society has more or less
 Concern in the Laws of it, it must be most con-
 formable to the Nature and End of Law in ge-
 neral, that he should have the best Means afford-
 ed him of attaining a Knowledge of those Laws,
 by

by which he himself is to be bound : for the Maxim among us, that *Ignorantia legis non excusat*, the not having a Knowledge of the Law is no Excuse for the Breach of it, does by no Means take away, but rather strengthens the Propriety of the Argument for affording the Subject sufficient, or at least the best, Means of being acquainted with the Laws, and especially such as are penal, lest, as the great Man just now quoted observes of their Multiplicity, the Laws themselves become Snares to the People.

It is indeed impossible for human Laws to be perfect ; all that is required of them is, that they be as good, and as useful as possible : And as some Inconveniencies will unavoidably attend the best of Laws, the Point to be aimed at is, to make them for a good End, and to frame them in a Manner likely to answer that End, and so as that the Conveniencies attending them may overbalance the Disadvantages which may occasionally result from the Execution of them.

If I shew that, tho' the Laws of this envied Country, envied as being under the best Form of Government ; envied as now under the best, most just, and generous Sovereign ; envied as blest with the Prospect of future Kings of the same Disposition, successively springing up in the
il-

illustrious Family now upon the Throne, having baffled all the Attempts of base Pretenders, and ruined all the Schemes of Arbitrary Power combined against it. If, I say, I make it appear, that the Laws of this our happy Country are capable of, and want Amendment, there can, I humbly conceive, be no room to deny the Propriety or Expedience of such Amendments taking Place, as soon as possible; for surely Utility can never be introduced too soon. In order to do this, which I shall endeavour, not out of a Desire to find Fault, but with a sincere and ardent Concern to promote the Happiness and Prosperity of my Country, with Deference to the better Judgments of others, and an entire Submission to the Opinion of the Legislature; it will be necessary for me not only to take Notice of the Matter, but also of the Execution of our Laws.

The Municipal or Civil Law of *England* is generally divided into two Branches, the Written, and the not Written, or the Common, and Statute Law of the Land. Under the first of these must be reckoned such particular Customs, as by long Prevalence have gained the Authority of Law in our Courts. To these might be added, the Ecclesiastical or Common Law; but as this seems to be in a great Measure under the Controul of the other two, I shall take no notice of it here.

The

The common Law of *England* is so prolix, and so widely scattered up and down in such a Number of Volumes ; that it is impracticable in such a Treatise as this, to give any other than a general View of it, and to take some Notice of it in the gross, will perhaps appear more modest, and be better on many Accounts, than to enter into Particulars: the most material Objections to this Branch of our Law, are its Bulk and Uncertainty. The Determinations of the Courts at different Times, upon one and the same Case, have given rise to quite opposite and inconsistent Precedents: the Points of Law that have arisen, have been so many ; and the perhaps too great Care and Nicety of the Judges in determining them, has introduced such a Number of minute Distinctions, and such copious and diffusive Arguments, grounded upon Varieties of former Precedents, and these again are so fully cited ; that the Study of the Common Law is more than the Business of a Man's whole Life: nay, when he has done all, he has got no further than the Boundary of Doubt, and very seldom reaches the Line of Certainty. What is the natural and unavoidable Consequence, in any Science, of intricate, inconsistent, and diffusive voluminous Arguments, but Error and Uncertainty? And what can arise from them in this Case, * but great

* Corruptissima Republica plurimæ leges. Tacit Annal. l. 3. C. 27.

Delay and Expence, or perhaps Ruin to the Subject in the Recovery or Defence of his Property? And by the same Means, an Opportunity is afforded the dishonest and indigent Practitioner to use Fraud, Oppression, or Extortion, towards his own Client, or the opposite Party. If Precedents are Law, or Evidences of the Law, and they are generally cited as such; where they oppose one another, I don't know how we can form any adequate or certain Idea of the Law itself. And if in this Case the Number of Authorities is to decide, I am fearful of many of the later Determinations of our Courts; but if it be said that the latest Resolution is always to determine, then every new Determination that is not warranted by a Precedent is illegal; and a subsequent Resolution is legal, only because the Point has been *illegally* determin'd the same way before. If it be said, that modern Resolutions are to be generally esteemed of more Authority than old ones, I am afraid this will place the Legislative as well as the Executive Power in the Hands of the Judges: and tho' of all Men, who ever enjoyed that Office, I should prefer the present to be Legislators; yet even with these, I think no such Power ought to rest, lest it should be a Precedent for their Successors, to exercise the same Authority in some future Time. That the giving such a Power is the natural Consequence of such a Supposition as I have just now introduced, is I think very plain; for

for if the Judge has a right to determine a Point of Law differently from what it has been before constantly ruled, and subsequent similar Determinations are from thence to take Place, he makes that to be Law which was not so before; and what is this but a Legislative Act. I know a Point of the greatest Consequence in Trade, relative to a Policy of Assurance, which within one Year was oppositely determin'd in two different Courts of Law: and many more Instances might be produced of a similar Nature, which I chuse rather to omit, and which I would willingly have obliterated and buried in Oblivion, in an Amendment of the Law.

The *Lex Scripta*, or Statute Law of *England*, will I am afraid appear liable to the same Objections as the other Branch of our Law, as being too uncertain, obscure, and diffused. There are many old Statutes, which still subsist, tho' by Time grown useless or obsolete. There are many which are contradictory to later Acts, and yet remain unrepealed. If there are different Punishments assigned by different Statutes for the same Offence, and various Remedies allowed for the same Injury; this must give the Litigious and Ill-natured an Opportunity to harraß and vex the unhappy Object of his Malice. There are more than ten Acts of Parliament relating to Bankrupts now

in Force ; and there is perhaps no part of the Law which is more difficult and uncertain. The Acts of Parliament relating to the Poor, which are at least a Dozen, are surely too numerous, if not in some Measure incongruous. And one Reason why the Acts of Parliament against the pernicious Practice of Gaming, have not had the Effects that might have been expected from them, may be their Multiplicity. The Uncertainty of the Statute Law also arises from the manner in which the Acts are usually penned, which makes them unintelligible to the generality of the People, and exposes them to the artful Glosses, or interested Doubts of those, who by their Profession may profit by the Dispute about their Meaning.

Should a Foreigner have *Coke*, *Salkeld*, or *Vernon*, or a Volume of the Statutes put into his Hands, what would he think of those opposite Doctrines on the same Point, different Punishments for one Offence, several Remedies for one Injury, Amendments upon Amendments, Repeals upon Repeals, and various obscure and doubtful Expressions, which he would there meet with ? What a strange Opinion would he from thence have of this Nation, which piques itself upon the Excellence of its Laws ? The very Idea of a Rule implies Certainty, and a Law is the Rule to which the Actions of the Subjects are to be referred, by which the Government expresses its Esteem or Dis-esteem
of

of them, and by which Disputes about Property among the Subjects are to be adjusted. And as *Quintilian* * observes; there is no Difference between uncertain Laws, and no Laws, *Quid interest, nullæ sint, an incertæ leges?* If the Means are not proper to the End, they are useless and absurd. How ridiculous then is that Law, which, being made to remove Doubts, creates them? How unaccountably absurd must be the Laws of that Country, where the honest Subject, the industrious Tradesman, or the laborious Mechanic, when he is unjustly deprived of his Property, or injured in his Person or Character, and seeks for Redress from the Laws of the Land, finds the Remedy worse than the Disease: his Right, however equitable and plain, is by Law rendered dubious; his Proof, tho' sufficient to convince a Man of Honour, does not come up to what the Strictness of the Law requires: the Opinion of the Learned upon his Case is different, and there are so many Subtleties and nice Distinctions in the Practice of the Law, that it is next to impossible for him to form any just Hopes of Success: at the same Time, his Opponent, who has perhaps less Honesty and Benevolence than Money, screens himself under this Uncertainty, and impudently defies his generous Creditor, or injur'd Neighbour, by shewing him the Length of his Purse? And what shall we say of that Nation, among whom this

* Declam. 264.

Exclamation too justly takes Place: O the glorious Uncertainty of the Law!

There are very few in this Nation, except those whose Professions oblige them to it, that are in the least acquainted with those Laws that concern them as Members of the Community. And as to Penal Laws, there are Millions of People in *England*, who commit Offences against them, without ever having had a proper Means of knowing themselves subject to a Penalty on that Account. And this is in a great Measure owing to the present Method of publishing, or rather not publishing, our Laws. Is it not every Man's Concern to know those Laws by which he ought to regulate his Conduct? And is it not something hard, that he should not have a proper Opportunity given him of attaining that Knowledge?

I shall omit taking any particular Notice here, of what is by way of Distinction called the Crown Law; as I shall have occasion to consider it by itself; and shall now make some Observations on the Execution of the Law, or the Practice of the Courts of Justice in Civil Affairs. And the most natural Remark is, that the Proceedings for the Recovery of Property, or Reparation of Injuries, are too tedious, expensive, and intricate: the Person injur'd is, of the two Parties, to be most favoured. And as all Laws ought not to be calcula-

ted

ted to screen the Injurious, and give him an Advantage over the Person he has injured ; but to give the honest Man and deserving Subject a Remedy for his Wrongs, Relief from Injury and Oppression ; and as without such Remedy, he may never reap the Fruits of his Labour, and his Family may perish for Want ; it should seem that his Remedy *ought* to be as easy and speedy as possible ; but the Practice in *England*, I am sorry to say it, seems to be the reverse. The Creditor is in the first Instance put to a great Expence for the Opportunity of recovering, what it is possible he may never get ; and if he prove successful, even that Success is very costly. If his Debtor be rich, litigious, or powerful, the Creditor is forced to follow him through all the miry Roads of sham Pleas, artificial Defences, Writs of Error, Certiorari's, and other expensive and dilatory Proceedings. He is at a certain large Expence, but his Success is uncertain or inadequate. I myself have met with a Case, wherein the original Cause of Action was no more than a Note of Hand for Three Pounds, and yet the Creditor was put to between Fifty and Sixty Pounds Charges for the Recovery of it. I also knew of another Man, who was totally ruined, tho' before of some Fortune, and in a good way of Business, by endeavouring in a legal Way, to procure a Reparation for an Injury done to the Wall of his House, by an encroaching and litigious Neighbour. In short, every Day's Experience shews, how true that

Pictu-

Picturesque Description of the Law is, which represents the Man who has gained his Cause, with only a Shirt to his Back; and he who has lost the Verdict, as quite naked. And those, who have been any Time acquainted with the Practice of the Courts, must often have seen Power oppress Honesty, and Riches screen the Injurious; not from any Fault in the Executors of our Laws, but in the Method of Proceedings. Our present Judges, of all the Courts, are Men of great Honour, Abilities, and Integrity; but they are obliged by their Oaths, to follow the Laws and Customs of the Land; being not properly the Makers, but the Interpreters of Law: and tho' the particular Practice of their respective Courts is within their Jurisdiction, yet any material Alteration there, it would be perhaps prudent for them to get a Sanction for, from some higher Power. And I dare say, many of them now wish that Reformation might take place, of which for fear of Odium and Ill-will from those whose Interest it may affect, they don't care to be the Beginners.

I have now considered in general, not only the Nature, but also the Execution of our Laws, relating to Civil Affairs, the Inconveniencies of which I have only just hinted at, because I shall have Occasion to recapitulate the Defects, in order to introduce the Remedies for them, which I now intend humbly to propose.

My

My first Proposition may perhaps appear difficult to be executed ; but if it be once put in Practice, I don't doubt the Success will fully compensate the trouble in the Execution. I do not offer it as a new Proposal, but as one that has been recommended by the Ingenious in former Times, and therefore I hope this Offer to revive it will come with more Force. What I propose is, to reduce into one Code or Body, that Law, which is now scattered up and down in different Authors, and in various Books of Reports, without Order or Connexion, under the Name of the Common Law. To reduce this, I say, as far as it is, or is designed to be, authoritative, into one regular, uniform and connected System, or Book of Digests, to be compiled by the Judges of the Three Courts at *Westminster*, and revised by Six Members of the House of Commons, and the same Number of the House of Lords, assisted by the Lord Chancellor ; and this System so collected, to be deemed the only standing Authority in the Common Law, and to be the Rule for the Determination of the Courts, unless set aside or abrogated by some future Act of Parliament : and that all the Statutes made since the Revolution, or at least since the Restoration, be no longer taken Notice of, or cited, as Acts ; but be ingrafted into the Common Law, and operate as such, and be accordingly, as to the Matter or View thereof,

inserted in the Common Law Code : and that such Code have none of the obsolete Terms, or illegal or inconsistent Determinations, which are now in the Books, introduced into it ; but that it be as plain, concise, and clear as possible. This would make the Law in a great Measure more certain, and consistent with itself and common Sense : it would lessen the Number of Special Verdicts : it would prevent a great deal of the Chicanery of Pettyfoggers, and much of the Trouble, Fatigue, and Delay, which is now found in carrying on a Suit for a just Demand, and make the Recovery of Property less hazardous and expensive. These are the Consequences which are likely to result from the proposed Amendment of the Law, and are surely desirable enough to warrant the sacrificing to them the Law Printer's Patent, and the enormous Gains of the Petty-Practitioners in the Law ; and I know of nothing else that there will be Occasion to make a Sacrifice of on this Account.

With regard to the Statute Law, I would humbly recommend it to the Consideration of the Legislature ; whether it wou'd not be most expedient, nay, whether it is not absolutely necessary, to revise the whole ? To repeal such Acts of Parliament, as are by a Change of Circumstances in the Public, grown useless or unprofitable ; or by Time and Failure of Execution, are grown
obsolete

obsolete and forgotten; for it seems to be an Absurdity, and a Reflection upon the executive Part of the Government, to have one Law subsisting, which is unregarded, or uninforced; and, as the great Sir *Francis Bacon* justly observes*, “ It brings a Gangrene, Neglect, and Habit of Disobedience upon other wholesome Laws, that are fit to be continued in Practice and Execution; so that our Laws endure the Torment of *Mezentius*: The Living die in the Arms of the Dead.” To examine wherein former Acts may be amended, and then to repeal them, and ingraft in a fresh Act such former Matter with the Amendment. To reduce all the Acts relating to one Subject into one Statute, and to pen all Acts of Parliament in a more careful Manner, and make them at the same Time plain and full. This might render the Acts themselves better observed, and less liable to Mis-construction, than they now are. It would ease the Magistrate as well as the Subjects, and be of great Advantage in all Respects.

As it seems absolutely necessary, that every Subject should have all proper Means afforded him, for attaining a Knowledge of those Laws by which he is to be bound, it would certainly be highly expedient, that our Acts of Parliament, and especially such as are penal, should

* *Mallet's Bacon*, Vol. 4. p. 3.

have a more general and notorious Publication than they now have. The Method which is now taken in the Publication of some Acts of Parliament, to wit, the reading them openly in the Churches, might be put in Practice with Regard to all Acts, till a better Way of making them notorious is found out. One Act of Parliament, at least, might be read every *Sunday* after divine Service, in all the Churches in *England* : And this surely might be done without any Offence to Religion or Decency, since the Observance of the Laws of the State is a very eminent and necessary Branch of Morality, and no less a Precept of Religion. A Heathen Orator declares, that all Governments are under the especial Care of the Deity *. And can we suppose, that the putting in Execution a proper Method to make a Man a good Subject, is either foreign to Religion, or disagreeable to God ? Or, is Christianity the only Religion, which neglects or abhors to take Society under its Care ?

I shall say nothing farther of the Theory, that I may have more room to enlarge on the practical Part of the Law, which I conceive chiefly wants Amendment, And here, as I before ob-

* Nihil est illi principi Deo, qui omnem hunc mundum regit, quod quidem in terris fiat acceptius, quam concilia, cætusque hominum jure sociati, quæ civitates appellantur. Cic. *Sonn. Seip. c. 3.*

served,

served, the first Objection that offers is its Delay. How tedious and slow in many Cases are the Proceedings in the Courts of Law? A special Plea puts you off for a Term. A Writ of Error hangs you up for a Year. A Demurrer is truly what it is called. If Delays in Law are Evils, and surely they are, then these Things want Amendment. Would it not, therefore, be proper to admit no Plea that is not issuable without an Affidavit of its Truth, and no Demurrer for Want of Form? The public Papers have informed us, that there is a Design on Foot to abolish, or, at least, regulate special Pleadings; a Design well worthy of the Legislature, and of the great Man, who is said to be the Proposer of it: yet worthy as this Scheme is, it has already met with Opponents, and has had this Objection offered against it, That it is necessary that the Person against whom the Defence is made, should know before Tryal what Matter his Opponent intends to insist upon: But if we consider, that where there is one special Plea filed, which the Person who makes it intends to insist on, there are ten that are put in only for Delay, or in order to perplex the just Cause of the other Party, and that no great Inconvenience has ever arisen from the Direction of any Act of Parliament to plead the general Issue, and give the special Matter in Evidence, the Objection will of Course vanish; especially if we further consider, that the Parties engaged in a Suit, except in the Case
of

of Executors, or other Representatives, must be supposed to be acquainted with the Transactions, which have passed between themselves ; and in all Cases almost, the Plaintiff must know what will be the Nature of his Opponent's Defence, or, if he does not, as the Practice of special Pleading now is, I will venture to say he cannot know it from the Plea. A just Cause on the Side of him who commences the Suit can't be injured by taking away special Pleadings, but it may be delayed or defeated by continuing them. A Defendant who has Justice on his Side, can't be injured by being obliged to plead the general Issue, since he may, notwithstanding, give the special Matter in Evidence ; and by such Plea he will the sooner get rid of a troublesome Suit, by the Determination of a impartial Jury. And surely Laws are not made for the Benefit of the Unjust and Litigious, but of the Honest and Upright. By this Alteration also double Pleadings will be prevented, and the Matter of Fact be always in Issue.

Another Occasion of Delay in the Law is special Verdicts ; but these would, I apprehend, be prevented by such a plain and compact Code of the Law, as I have before proposed ; for it would be very easy for one Judge only to decide by such a Rule.

Delay in Proceedings at Law is also occasioned by Removals of Causes from one Court to another
by

by *Certiorari*, or Appeal, or by suspending Execution by Writ of Error. As to Removals before Tryal. It ought, I think, to be supposed, that every Court of Justice will decide justly, or when this Supposition cannot reasonably take Place, with regard to any particular Court, that Court ought not to have any Jurisdiction at all. And what other Reason, but a supposed Neglect, or Refusal of Justice, can be assigned, for taking out of the Hands of a Court of Justice, a Cause within its Jurisdiction, and once begun in it. It should therefore seem most proper, that no Cause commenced in a Court, which has Jurisdiction in that Instance, should be removeable out of that Court; since all Probability is against an erroneous Judgment in any Court, which ought to have Authority, and one Court may, as to Possibility, err as well as another, and it is at best a Removal from fallible to fallible. As to Removals into superior Courts after Tryal, I think there is as little Reason for them as for the other. Ought we to suppose that the Verdict of twelve Men, sworn to determine according to Evidence, is erroneous, upon the Assertion of one Man, against whom the Verdict is given, that he thinks it so? The Law assigns to each Court its proper Jurisdiction: and if there are two Courts, which have Jurisdiction in the same Case, the Person supposed to be injured, and seeking Redress, is the Person to be protected and eased, and he
has

has certainly a Right to seek a Recovery or Reparation in whichever of the two Courts he thinks fit; and if the Cause is once commenc'd in, and determin'd by, a Court having Jurisdiction, the Party, in whose Favour the Cause is decided, suffers a real Hardship, and is deprived or delayed of his undoubted Right, by the other Party's preventing the Effect of such Determination, by a Removal of the Cause into another Court. And as to Rehearings, very few Inconveniencies would arise, from making the first Determination of a Jury final.

As to Writs of Error, they are generally dilatory, and are therefore improper to be admitted, where there has been a Verdict of a Jury. They are brought at the Will of the Party, without a previous Inquiry by the Court whether they are necessary, and upon a simple Allegation of supposed Errors: they cannot be brought for any other than Defect in Matter of Form, and are generally brought for Errors of little Signification. And shall a verbal Error be allowed, to render ineffectual a Verdict, at least to be supposed just for what appears, and founded on Fact and Evidence? Surely not. And would it not prevent great Delay and unjust Vexation in Proceedings at Law, if no Writs of Error were allowed, where a Verdict has been given? And as to any Defect in the Proceedings; if there is such a Mistake

take in the Record, as that a manifest Inconsistency would appear upon the Face of it, should the Plaintiff recover thereon : It would be much better, for the Court, if such Discovery of a Defect is made before, or at the Tryal, to order the Record to be instantly amended, and immediately proceed upon the Merits ; or after Tryal, to order the Record to be amended upon Motion to the Court, at the Expence of the Party moving, without arresting or defeating the Judgment obtained. Upon Judgments by Default, where the Fact has not been enquired into by a Jury, there may be more Reason for admitting Writs of Error ; but in all Cases where such Writs are allowed, I would propose, that the Transcript be made, and the Errors assigned and heard, or else the Writ quashed, within one Term, and not left, as it is now, to the Delay of a Year or more. There is not perhaps one Writ of Error in twenty that is affirmed, nor scarce one in twenty of the Judgments recovered on default, but what are equitable and just : So that even in these Cases there seems to be but little Plea for such Writs, which are Engines in the Hands of a Rogue, to play against an honest Creditor.

The next Thing, which offers itself for Amendment in the Law Proceedings, is their Intricacy. And under this Head special Pleadings come

E

again

again to be taken notice of. And if Error is often the Consequence of Obscurity ; if Law is calculated for the easy and certain Recovery of Property, and ought to be an open and plain Path, then special Pleadings ought on this Account to be abolished : But as a Scheme for that Purpose is now on foot, and, as it is said, under the Patronage of a very great Man in the Law, I shall say nothing more of them under this Head. Fines and Recoveries justly merit the same Remark, and would have a proper Place here, as well as under the next Inconvenience ; but as these are also within the Design of the above eminent Professor of the Law, and as there is, (as it is said) a Proposal to be made to Parliament for the abolishing them, and instituting the Inrollment of Deeds in their room, which will be less intricate, less expensive, and not so dilatory ; and the Scheme is of so salutary a Nature, that I cannot but suppose it will meet with the Encouragement of the Legislature ; I shall take no further notice of these fictitious Proceedings, as they are probably in much better Hands.

The Practice of the Courts, one would imagine, ought to be certain, and free from Doubt, clear and determined, not dispersed in various Rules made at different Times, some of them contradicting others, but reduced into a regular Treatise, which might be the Authority in all Cases. This would prevent

vent a great many of the Mistakes of the Practitioners in the Law, and a great deal of Expence and Delay to their Clients.

The next thing to be considered is the Cost of the Law, in Process, Pleadings, Councils Fees, and a large Number of Expences, which often prevent the honest Trader's recovering his just Demands from his fraudulent Debtors. He knows he must be at a certain Expence in endeavouring to recover even a small Sum ; but, from the Uncertainty of the Law, and the Chicanery of some of its Professors, he is doubtful of the Issue. Nay, if he actually recover, he knows he must be at a considerable Expence, as he is not allowed his full Costs. Thus many a Villain, who has forfeited all the Protection of Society by a Breach of its Laws, avoids the Payment of his Debts at the Expence of the Fortune, and to the Injury of an honest Man ; and this by Virtue of a Defect in the Manner of executing those Laws, which should enable the Creditor to recover his Property in as speedy and easy a Manner as possible : To remedy this Evil great Care should assuredly be taken, for it is not only an Inconvenience, but it is Injustice ; not only a Hurt to Individuals, but a Discouragement to Trade. On the other hand, by the Practice of our Courts at present, a surly ill-natured Creditor has it in his Power to

oppress, and run to a considerable Expence his honest, tho' perhaps poor, Debtor, for a small Sum, without ever demanding his Money, or delivering him a Bill of Parcels. This last Inconvenience might perhaps be prevented by obliging the Tradesman, at the Time that he swears to his Debt, in order to found his Action (if for Goods sold) to swear that he has caused a Bill of Parcels, or some Note of the Debt to be delivered to, or left for, his Debtor at his Place of Abode; or if no Affidavit of Debt before Action, to prove it on the hearing of the Cause: And also by limiting the Jurisdiction of the Courts at *Westminster* to Debts above ten Pounds; which Proposal I shall take further notice of by and by. To prevent the other Inconvenience of the Tradesman's being put to a considerable Expence in recovering a just Debt, and the Defendant being put to great Costs in defending himself against an unjust Demand, it seems highly expedient to abolish Special Pleadings; not to allow in Causes in *London* or *Middlesex*, except for a very express and urgent Reason, any longer Time to plead than what is now given by the Standing Rules of the Courts; not to admit a Special Jury in any Case, except where an Affidavit, is made, that the Debt, Right, or Demand, sued for, amounts to above One Hundred Pounds in Value, and that there is some Special Custom or Title to come in Question on the Trial; never to postpone any Cause when once entered

tered or set down for Trial; to limit the Fees of Council upon Trials; to give the Plaintiff, upon Recovery, his full Costs, unless the Judge, before whom the Cause is heard, shall certify that there was probable Cause or reasonable Matter of Defence; and also to allow the Defendant, upon the nonsuiting the Plaintiff, where the Nonsuit is on the Merits, and also where the Plaintiff don't proceed to Trial, his full Costs, unless the Judge, before whom the Cause is heard, shall certify that the Plaintiff gave sufficient or probable Evidence, upon the Trial, of some Matter of Fact, and that such Fact was a probable Cause of Action.

It is often the Misfortune of People in Trade, not to be able to produce what is now necessary, as a legal Proof of the Sale and Delivery of their Goods: and there are many Tradesmen who sell and enter every thing in their Books themselves, and cannot therefore bring legal Evidence of the several Articles; which is a great Hardship to the Trader, and often obliges him to undergo the Loss of his Debt. But if something like the old Practice of waging Law was permitted, in all Cases where the Trader could not produce a disinterested Witness, it would be of great Service to Trade, and not attended, as I can at present perceive, with any ill Consequences. Suppose, therefore, that upon a Tryal for Goods sold, or Work done, the Plaintiff should be allowed to
take

take his Oath, that such Goods were sold, and delivered by himself, and that no Servant or other Person was concerned in, or present at such Sale or Delivery; or that the Work was done by himself, and not by his Servants, or any other Person, and to swear to the several Particulars of such Goods or Labour: and that such Oath should be deemed a sufficient Evidence in Law of the Fact, so as to Intitle the Plaintiff to a Verdict, unless the Defendant or supposed Debtor would take an Oath that he never bought or received such Goods, or never caused such Work to be done for him: and that a false Oath, taken by either Party, should be deemed Perjury, in the same Manner, and under the same Penalties as the false Oath of an Evidence.

The greater Part of the Debts contracted in the Skirts of this City, are for small Sums; and there are many Persons in every City and County in *England*, whose Trades are of such a nature, as that they never have any large Debts due to them, in the way of Trade, from one Person; and yet their Book Debts are, in the whole, of a very considerable Amount. What Method then can they with Safety take for the Recovery of their Debts, when the ordinary Expence of bringing a Cause to a Trial in the Courts at *Westminster*, is between Ten and Twenty Pounds. Is it worth the Tradesman's

man's while, not only to put himself to the Expence of 15*l.* but also to great Trouble and Fatigue, to recover 10*l.* or 5*l.* when perhaps, before the Suit is ended, his Debtor will move off, or become Bankrupt? Would it not therefore tend to the more easy and speedy Recovery of small Debts, if the Courts of *Westminster-Hall* had no Jurisdiction for Debts under 10*l.* And if the Jurisdiction of the Sheriffs Court in the City, and all other Sheriffs, or other Inferior Courts now subsisting, where the Trial is by a Jury, as in the Courts above, was limited to Debts between Five and Ten Pounds: and if all Debts, not amounting to Five Pounds, were recoverable only in the Courts of Requests, or Conscience. And as the Sheriff's Courts have been long disused in many Places, I would further propose, that in every City, Town, or County, having a Sheriff, such Sheriff be obliged to hold a Court every Fortnight at least, in some convenient Place, in every City, &c. to take Cognizance of all Debts between 5*l.* and 10*l.* of such Nature as the Sheriff's Court in *London*. And that by the same Act, Courts of Conscience or Requests, of the same Nature with those in *London*, *Westminster*, and *Southwark*, be established in every City and considerable Town in *England*, and also one or more in every County, for the County, to take Cognizance of, and determine in a Summary Way all Demands under 5*l.* And lest any Objection to this Scheme should

should arise from a supposed Diminution of the Public Revenues in the Stamp Duties, I would propose, that all Summons and other Process issuing out of such Courts of Conscience or Requests, for Debts above 40 s. should be stamped with a single Six-penny Stamp.

By this Method of establishing Courts, where the Expence of Proceeding would bear a Proportion to the Cause of Action; great Delay and Cost, as well as a great deal of Oppression and Poverty might be prevented, and useful Credit among the lower Sort of People strengthened and confirmed. The honest Tradesman, whose Living depends upon the Sale of his Goods to Persons in a low Way of Life, and whose Bills seldom amount to any large Sum, being enabled to recover his Property with ease and speed, would be more likely to Support himself and Family with Credit, and would perhaps be prevented from Ruin, which I know has been the Case of many, whose Debtors have refused to pay without Force, and who have neglected to oblige them to it, because they thought the Remedy worse than the Disease. Nor is this so immaterial a Concern to the Nation in general as may at first Sight be imagined; for Trade is a connected Chain, the breaking the last Link of which, sensibly affects the first; and there are more Goods and Manufactures consumed, in general, by People who never
can

can contract a Debt above 5*l.* than by those who are in most affluent Circumstances: for if we consider the great Number there are of Labourers and working Men, tho' their Consumption of Goods, as Individuals, is not so great as the private Consumption of those in higher Ranks; yet, taken as a Body, the lower Rank of People, on account of their Numbers, consume more Goods, and of course are of more Consequence to Trade than any other Rank of Men among us. The less Credit these poor People have, the less is their Consumption of Goods; and the less will their Credit be in Proportion, as the Method of recovering Debts from them is more troublesome and expensive. Besides, many of these poorer sort of People may be well able to pay a Debt of 3*l.* or 4*l.* with 5*s.* or 6*s.* Costs added to it, when it would prove their utter Ruin to be forced to pay the same Debts with 10*l.* or 40*s.* Costs; and it is a great Hardship to confine a Man in Gaol for Years, for a Debt of 5*l.* It may be robbing the State of a laborious, and therefore useful Subject.

The Sheriff's, and other Inferior Courts, are less expensive than the Courts above, and the Courts of Conscience much less than these; but I do not propose to bring Suits for above 5*l.* within the Jurisdiction of the last; because I think Law may be too cheap, as well as too expensive; which

F

will

will encourage Knavery and Litigiousness. The Inferior Courts of Law have been objected to, as often favouring iniquitous Proceedings; but its surely possible that they may be put upon a better Footing: and in the Courts above, tho' I am very certain iniquitous Proceedings are never connived at, but are always punished when found out, by the worthy Judges of those Courts, yet the Practice and Nature of those Superior Courts, I am persuaded, often gives an Opportunity to Pettyfoggers, to carry on the most dishonest Practices unknown to the Judges. And if the Inferior Courts were so regulated, as that a fresh Jury should be Sworn every Court Day, and not the same Jury always; and that no Persons should be admitted to purchase any Place, or at least, not permitted to act as a Judge, Clerk, Solicitor, Attorney, or Council, in such Courts, without being first approved of by two or more Judges of one of the Superior Courts at *Westminster*, with some other Restrictions, a great many of the Inconveniencies, which now attend those Courts, might be prevented.

I have purposely hitherto omitted taking notice of the Courts of Equity, and shall now only humbly recommend it to the Consideration of those worthy Judges, who preside in those Courts, whether the Proceedings there are not much too
dilatatory

dilatory and expensive, and whether those Inconveniencies might not be remedied by shortning the Pleadings, limiting the Fees of the Council at Hearings, determining in Court many Matters which are now referred to the Masters, obliging the Practisers in the Court to take out a Warrant on a Reference within a limited Time after the Order of Reference, and to attend on the first Warrant; and also by dismissing, on the last Day of every Term, every Bill on which no Proceedings had been within that Term. And as the Value of Money, as well as the Charges of Law, are greatly altered since the Time of *Henry* the VIIth, when the Act relating to Paupers was made; and as the common Costs of carrying on a Suit in Chancery to a Hearing amount to at least 20 Pounds; does it not seem most agreeable to Common Sense, that he should be deemed a Pauper who is not worth that Sum; for a Man may be now worth Five Pounds, and not able to carry on a Suit in Chancery.

As the Proceedings in the Courts of Equity must necessarily be always so chargeable, as not to make it worth while to proceed therein for a small Sum. And as equitable Demands, especially Legacies, are often small, I would recommend it to the Consideration of the Legislature, whether it would not be expedient and beneficial

to the Nation, to establish an Inferior Court of Equity, for all Demands under 100*l.* the Manner and Costs of the Proceedings in which, might bear a proper Proportion to the Demand.

I proceed now to take notice of the Crown Law, which I have already declared my Intention to consider by it self. And the late Frequency of Robberies and other Breaches of that Law, have afforded me a larger Field than I should have wished, and lead me to take some Notice of what has been occasionally offered on that Subject already: but I am in a great Measure prevented in what I had to say, by Mr. *Fielding's* late Excellent Inquiry; which, tho' he seems to have too much Partiality for those who sit upon the Bench with him, is not only worth the Perusal of the Learned and Powerful, but also of those who would get an Insight into the Parochial and Penal Laws of the Land.

It will be but a necessary Precaution, to enquire first what is the proper End of Punishment under Civil Governments, and this we shall find by the Lawgivers and Writers of Antiquity, and the Reason and Nature of Things confirm their Sentiments, is Threefold, to wit, the Safety of the People, the Reformation of the Offender, or the making others
better

better by his Punishment *. It is not therefore only necessary to consider what is the abstract Quantum of the Crime, but also the Disposition of the Offender, and the Danger to the State from letting him escape. Some have objected to the Nature of our Punishments in *England*, and have thought that the inflicting Death for any other Crime than Murder, was contrary to Humanity and Religion: this Notion the universal Practice of all Nations has by no Means favoured, but continually contradicted; for among the *Egyptians*, *Grecians*, and *Romans*, nay even among the *Jews* themselves tho' a Theocracy, other Crimes were punished with Death, besides Murder; and if a Government has a Power or Right of inflicting any Punishment, it must certainly have a Right of making use of such a particular Sort as will be equal to all the Purposes of Punishment; and if no other Penalty is so likely to amend the Criminal, and preserve the State from his future Depredations, Death must be inflicted, or the End of Punishment is not answered; and surely in such a Case, a lesser Punishment, which is only inflicted because a Crime has been committed, and which answers no End, is not justifiable †.

* In quibus [Injuriis] vindicandis hæc tria lex secuta est, aut ut eum, quem punit, emendet; aut ut poena ejus ceteros meliores reddat; aut ut sublati malis ceteri securiores vivant Sen. de Clem. l. 1. C. 22.

† Nam, ut Plato ait, nemo prudens punit quia peccatum est, sed ne peccetur, Id. de Ira. l. 1. C. 16.

Death,

Death therefore may, consistently with Religion, and Justice, be inflicted for other Crimes than Murder. The next Question then started is, whether Death be politically a proper Punishment for any other Crime, or whether the Frequency of Executions in this Nation answers the End proposed. And it is said, that many other Punishments might be invented, which would be more terrible, and therefore more proper to be put in Execution, in order to prevent the enormous Crimes which are now so frequently perpetrated. In Answer to such Objections, I would ask whether Death be the greatest Punishment that can be inflicted? if it is, why should a less Penalty be invented in order to deter from Crimes; and if it is not the greatest, why should Murder, which is the greatest Crime, undergo only that which is the least Punishment? It is said, by such frequent Executions, the Terror of the Punishment is lessened, and the State is deprived of many Subjects: but how is it really prevented from having its proper Effect? Not by the Frequency of the Executions, but by the Manner of performing them, or perhaps rather by the Inattention of the Ignorant, Careless, or Extravagant, who have no Thoughts about any Punishment at all, at the Time of their committing bad Actions: nor is the State deprived of Subjects worth preserving. It is not merely the Multitude of Citizens that is the Strength of the City, but the Number of Industrious,

ous, Sober Inhabitants * ; for every bad Member of Society, is a contagious Disease which may Infect the sound Parts of the Body, and if there is no other Means of stopping the Contagion, the infected Limb must be cut off, even in Mercy, unless it be greater Benefit to preserve one Limb of the Body, than all the rest †. And as far as we have any Account of the former Lives, Manners, and Dispositions of the Criminals who are executed at *Tyburn*, we may easily perceive that no Alteration of the Nature of Punishments would have been a Remedy suitable to the Disease; but that if any thing relating to them would do it, it is what Mr. *Fielding* proposes, as to making the Executions more solemn. And no Instance I believe can be produced, at least of late Years, where any Man has actually suffered at *Tyburn* for the first Offence, except in Case of Murder. Most of those unhappy Men who have made their Exit at that fatal Place, have been nurtured and long hardened and experienced in the Ways of Vice §. Let us then lay the Axe to the Root of

* *Plerique rerum Potentes perverse consulunt, et eo se munitiores putant, quo illi quibus imperitant nequiores fuere. At contra id eniti decet, nam pessumus quisque asperrime rectorem patitur. Sal. ad Cæs. de rep. ord. Orat. 1.*

† *Qui vivi noluerunt prodesse, morte certe eorum Republica utatur. Sen. de Ira. l. 1. C. 6.*

Cuncta prius tendanda, sed immedicabile Vulnus

Ense recidendum, ne pars sincera trahatur.

Ovid. Met. l. 1, Fab. 6.

§ *Nemo repente fuit Turpissimus, Juv. Sat. 2.*

the

the Tree, and endeavour to prevent the Infection ever reaching the Limb, by keeping it out of the way of Danger. If we examine the Sources of such Enormities, as bring to the Gallows, or the Colonies, nay, of all the Breaches of Public Order and Peace which now prevail; we shall find them to be Want, Idleness, Ignorance, Extravagance, or bad Company. As to the first, we seek for a Remedy to this Evil by amending either the Laws relating to the Poor, or the Execution of them: as to the Laws themselves, however excellent the Provisions in them may be, they cannot be deemed adequate to the Ends they ought to answer; they seem to be too open, not compulsory enough, as well as too many in Number, and uncertain in Matter, but still they are so good, that it redounds to the Dishonour of this Nation that they are not put in Execution. In short, if we would have less Criminals, we must have better Justices of the Peace, Men more vigilant, less interested in supporting Crimes, and more active in discovering them, and punishing Under-Officers who neglect their Duty. And those Officers who have the Management of the Poor, must be more compassionate, and not neglect the Cries of the Needy, in order to save themselves Six-pence in the Year, by doing all they can to prevent the Necessitous from having any Relief in their Parish.

Another

Another Cause of Vice is Idleness ; but what Remedy have we for this, bnt putting the Laws in Execution against Vagrants and Strollers, or perhaps first amending them carefully, and then executing them strictly : Searching the Places of public Resort for idle Boys, and Gamb-
 lers ; such as *St. Georges's, Leiceſter, and Moor
 fields* : and ſending ſuch as are found there to Places of Labour and Correction. Some are idle becauſe they cannot get Work ; and for ſuch as theſe it would be very uſeful, for the Public to erect Workhouſes, for the ſetting to work ſuch Manufacturers as are unable to procure Employ-
 ment in the private Trade : under this Head we may alſo rank ſuch unhappy Men, as, by having been in Goal ſome Time on Suſpicion of Crimes, but at length acquitted, are reſuſed Employment, and are become the Outcaſts of Society, and alſo ſuch as have long lain in Goal for Debt, and are diſcharged by inſolvent Acts : for each of theſe there ſhould be ſome Proviſion, and a Place pro-
 vided to ſet them to Work at the public Expence, if they cannot procure Employment from private Perſons. But the moſt effectual Means to prevent Want and Idleneſs ſeems to be, repeal-
 ing all the Acts of Parliament relating to the Poor and Vagrants, and making the Proviſion for the Poor, either impotent or indolent, one united Fund, to be raiſed in Proportion or Conformity

to the Land or Window, or some other Tax, all over *England*; and providing, that in every City, Town, County or Subdivision of a County, there be a general Reciver of that Tax in the same Manner as of the Land-Tax, as well as the now usual Officers for the managing of the Poor; and that every City or Town, having a Sheriff, and every County, or a Subdivision of a County (if thought more proper) shall erect a Workhouse, and House of Correction, for setting the Poor to Work, and punishing Vagrants, or idle or disorderly Persons; and that every poor Person, who is unable to work, shall be taken Care of by that Parish, where, at the Time of the Commencement of such Inability, he shall be, without any Regard to the Place of his Nativity; and that every Vagrant, Stroller, or Person able to work, shall be set to Work, and punished, in that Place where he is taken, with proper Penalties annexed, upon the Magistrates, the Officer of the Poor, or Inhabitants of the Place, in which such Act shall not be put in Execution; and that the respective Officers of the Poor in every such City, Town, County, or Division, shall and may from Time to Time have, of the Receiver of the Tax in such respective Places, as much of the Money collected in such Place, as shall be sufficient to answer the current Expences attending the Poor in such Place, the Overplus of the Money to be

be transmitted by the Receiver to a proper general Office, to be appointed for the Management and Care of the Poors Tax ; and wherever there is not sufficient, collected within any Place, to defray the Expences of the Poor there, such Deficiency to be made up out of the general Fund. I only offer this as a rough Sketch, or imperfect Draught of a Scheme which would remedy the Inconveniencies and Delays in passing the Poor, prevent so many Law-Suits about the Settlements of the Poor, as now take Place ; take away all Manner of private Interest in the Officers of any particular Place : And as all are concerned in the Poor, all will, by this Means, in proportion to their Abilities, bear a Share of their Support. To which Sketch many other Restrictions and Clauses might be added, which I shall not presume to enumerate. Nor is this an entirely new Scheme ; for, if I do not mistake, somewhat like this was intended to have been proposed some Years since by a very great Man in the Law, if he had not been prevented by Death,

Such Punishments as Branding, Whipping, and even Transportation, might be very properly changed to hard Labour and Correction, suitable to the Nature of the Crime.

And as Drunkenness in a great Measure contributes to, and is also the Consequence of Idleness, it may not be improper to take some Notice of it.

And if the Lives, the Industry, the Honesty of thousands, is worth preserving, the Legislature have great Reason to endeavour to suppress this Evil, against which, as it was formerly practised, there are many good and wholesome Laws now subsisting, tho' but little regarded ; but they are not altogether adequate to the Prevention of that Crime, as it is at present practised, Gin, that worst and most pernicious of all intoxicating Liquors, being very little known among our Ancestors. To remedy the Inconveniencies arising from this Poison of the Poor, without a total Prohibition, I would propose, that in the City of *London* no Person be admitted to sell less than a Gallon of that Liquor, except a Member of the Apothecary's Company who has been regularly bred as such, under the Penalty of five hundred Pounds ; and that no Person, in any other Place in *England*, sell less than that Quantity, except he shall have practised as a Surgeon and Apothecary within the Parish wherein he shall sell such Liquor, for at least a Year before such Sale, under the like Penalty ; and no such Apothecary or Surgeon so authorised, either in *London* or elsewhere, shall sell in his House or Shop, or send out, any more than one half Pint of such Liquor within twenty-four Hours, under the Penalty of One hundred Pounds, and forfeiture of his Freedom or Right as an examined Surgeon, and of all Exemption,

by

by Virtue of his Profession, from any Ward or Parochial Office.

Ignorance, and Want of Education and Discipline are frequently the Sources of Crimes that lead to the Gallows; and though there are already many charitable Designs for the Education of Youth; yet this Consideration should prompt us to extend them, if possible, and to remove the Obstacles, which are often met with, in getting Children into those Seminaries. The Education of Youth is one of the principal Means of promoting the Happiness of the Community; for, as *Aristotle* * observes, even the best and most approved Laws are of no Use, unless Subjects be trained up in a Manner of living conformable to the Government. And *Plato* † says, that to lay the Foundation of a good Government we must first begin with the Education of Children, and must make them as virtuous as possible; as an experienced Gardener employs his first Care about the young and tender Plants, and then goes on to others.

Extravagance is another Spring of Vice which seems most likely to be prevented, by lessening the Number of public Diversions to which the poorer Sort of People can have Access; by not granting so many Licences for Alehouses; by not placing in the Magistracy, those who by their Trade have an Interest in promoting such Houses; by putting

* *Aristot. Polit. l. 5. c. 9.*

† *Plat. Eutyph.*

in Execution the Laws against Gaming and Gaming-houses, and Houses of Lewdness, or by making them, if possible, more strict ; and by either absolutely prohibiting those Houses which are the Bane of the Young and Idle, by seducing them to Lewdness and Extravagance ; or else by so regulating them as to prevent their present pernicious Effects.

The next Source of felonious and other Crimes is bad Company : and this must chiefly be the Care of Parents ; but may also demand the Vigilance of the Magistrate, in clearing such Places of public Resort as I just now took notice of, and also making proper Inquiry into Houses of bad Fame, or where bad Company resort, and punishing such as are found either idle or disorderly therein.

These are, as far as I could ever perceive, the Sources of all manner of Vice ; and as the Persons affected with these Habits are very little given to Thought or Consideration, we must never expect to deter them with the Prospect of any Punishment, be it ever so formidable. If we can't prevent such Habits taking place, or destroy them when established, I am afraid we shall never prevent the Crimes consequent upon them. We may talk of changing the Punishments, to make them more terrible ; but this, as I observed before, will

will be of little Use, when those, who commit Crimes worthy of Punishment, never think of the Consequence of their Crimes before, and scarce ever after, Conviction ; being either lulled in Stupidity or Drunkenness, hardened in Vice, or compelled by Want or Extravagance : Such Criminals we may pity ; but, if we would live in Peace, we must not pardon, any more than we would permit a Wolf to remain undisturbed in the midst of a Flock of Sheep. In short, to prevent these Evils taking place, we must have good Laws affecting the Sources of Crimes, and these properly and strictly put in Execution.

And still farther, if possible, to prevent the perpetrating such enormous Crimes as are now practised, I would propose that every Housekeeper and Cottager be obliged, upon Pain of paying 40s. half to the Poor, half to the Informer, to enrol or register the Name and Business of every Person inhabiting, lying, or lodging in his House, with the Rector, Parson, or Curate of the Parish where such House is, in order that the Justices of the Peace, and other Magistrates, may be informed how such Persons are employ'd or get their Livelihood ; and that any Person applying to the Rector, &c. may have a Copy of any Entry in such Register. And as it is part of the Duty of the Rector, &c. of a Parish, to take care of
its

its Peace and Welfare, and to examine into the Morals of his Parishioners ; he might be obliged, under a proper Penalty, to give in to some neighbouring Justice, Mayor, &c. Information of all such Houses within his Parish, as he shall have Cause to suspect, or which are notorious for harbouring idle and disorderly People, or where Drunkenness, Debauchery, or Gaming is practised : And the Justice, &c. to whom any such Information is given, might be properly empowered, and under a Penalty enjoined, to cause such Houses to be searched, and not only the idle or disorderly Persons there found, but also the Occupier or Master and Mistress of such House, to be properly punished, or employ'd ; that the Landlord of such House be disabled to recover his Rent, and the Tenant from recovering any Debt, Right or Demand, in any Action at Law ; as was in some measure practised among the *Romans* *.

As many Persons are no doubt induced to steal, and commit other Crimes, for the Sake of Lucre, and if there were no Receivers there would be few Thieves : and as the one may be

* Si quis eum, apud quem alea lusum esse diceter, verberaverit, damnumve ei dederit, five quid eo Tempore dolo ejus substractum est, judicium non dabo. Digest. l. 11. Tit. 5. leg. 1.

impelled by mere Want, while the other connives at the Offence with baser Views, and frequently persuades the Thief to, and directs him in, the carrying on the Crime, and is therefore equally culpable, if not more guilty; I would propote, that the Receiver or Buyer of stolen Goods, knowing or suspecting them to be Stolen, should receive the same Punishment, as the Thief does, or would have done, if convicted, whether before or after the Conviction of the Stealer: And also that every Person keeping a public Lodging-house, Ale-house, or House of Entertainment, and voluntarily and knowingly permitting any Person guilty of any criminal Offence, to lodge or remain within his House, other than a Father or Mother, or any other Parent *, for the space of Three or more Hours, should forfeit Twenty Pounds for the first, and suffer Transportation for the second, Offence: As to the Proposal to register the Names of all Persons with the Parson of every Parish; something of the same Nature was enacted among the *Egyptians*, where it was ordered †, that all Men should give in their Names to the Magistrates, and also by what Means they got their Livelihood; and a very great

* Eos, apud quos adfinis vel Cognatus Latro conservatus est, neque absolvendos, neque severe admodum puniendos; non enim par est eorum delictum, et eorum, qui nihil ad se pertinentes latrones recipiunt. Digest. l. 47. Tit. 16. leg. 2.

† Diod. Sicul. l. 1. c. 77.

Punishment was annexed to the Breach or Perversion of the Law: for it was enacted, that whoever gave in a false Account, or practised any unlawful Way of Gain, should be punished with Death. And we are told *, that the People of *Sardis* had a Law to the same Effect: and *Solon*, † in his Laws, directed, that the Senate should enquire how every Man got his Livelihood, and punish them who had no Business: and the same Legislator, still to shew his greater Caution, made a Law, that no Son should be obliged to maintain his Father, who had not taken Care to bring him up to some Trade.

Another Obstacle to the Prevention of Crimes, as our Laws now stand, is the Expence and Trouble of prosecuting Offenders, which can only be removed, by appointing a proper Officer to carry on all criminal Prosecutions at the public Expence, in the Name, and under the Inspection of the Attorney-General, to avoid Compromises or underhand Dealings between the Criminal and the Person injured. This would in a great Measure prevent the political Inconveniencies arising from the Selfishness of those, who imagine that what is every Body's Business, is not their's. *Cicero* would

* *Ælian. var. Hist. l. 4. c. 1.*

* *Plut. in Vit. Sol.*

inform such People, that this Indifference is as bad as betraying their Country *.

And now, I have finished what I intended upon the Subject, and hope I have said nothing unbecoming or impertinent in my handling it. I declare I have no Intention to affront or hurt any Set of Men, either in their Characters or Fortunes. I have endeavoured to use the Sore as tenderly as was consistent with my Design to cure it, and my sole Aim is the Interest of the Public, independent of any Party Views, or selfish Designs; and if I have given but one Hint, which may prove acceptable to the Impartial and Judicious, or useful to the Public, I shall be sufficiently compensated.

P O S T S C R I P T.

SINCE the preceding Treatise went to the Press, it has been reported, that an Attempt would be made to prevent the great and pernicious Use of Spirituous Liquors, by laying a considerable Duty on them at the Still Head; but how far such a Law will fall short of the Ends intended by it, unless the Duty is so high as to

* Nec magis vituperandus est proditor patriæ, quam communis utilitatis aut salutis defensor propter suam utilitatem aut salutem. Cic. *de fin.* l. 3. c. 19.

prevent the common Sale of this Commodity, may be easily perceived from what has formerly happened to such kind of Expedients; for we find by Experience, that the Generality of Mankind are so perverse, as to raise their Desires, in Proportion as the Difficulty of gratifying them is increased. If therefore the additional Duty on Spirits be so small as to admit the same Quantity to be sold for a Penny, which is now purchased at half that Price, which it may be if the Duty is no more than 8*l.* per Ton, it will be scarce a Restriction, and hardly prevent the Sale of one Gallon in a hundred. But if the Lives of Thousands of his Majesty's Subjects are worth preserving, or their Labour is of any Value to the Public, or if the Bishop of *Worcester's* excellent Sermon and Letter on the Subject are not notoriously false and absurd, the Total Prohibition of Gin, or Compound Spirits, if that alone will prevent the extravagant Use of that pernicious liquid Fire, ought not surely to occasion the least Hesitation.

As to the Restraint propos'd, with regard to the Sellers of that poisonous Liquor, that they shall be such as are regularly brought up to the Distilling Trade, and have in their Shop a Still of a Hundred Gallons; this will not be effectual, unless they are prevented from keeping more than one Shop, or having more than one Apprentice
at

at a time. Nor will all these Restrictions be of any great Effect, unless the Smuggling of such Liquors be prevented; and how can this most atrocious Crime be put a stop to, but by punishing not only the Smugglers themselves, but also their Abettors, Supporters, and Encouragers, in the most exemplary Manner. If the Dealers in Smuggled Goods are Men of Fortune, as many of them are, their Crime is the greater; if they have large Concerns in Trade, the pernicious Effects of their Iniquity are the more extensive, if they are in public Posts, the more worthy of Punishment, because their Actions are in proportion more dishonourable. If the Duty on Spirituous Liquors is any thing considerable, he who sells them at a less Price than the Duty amounts to, must be either a Fool, or knowingly an accessory to Smuggling, and therefore a Knave; if the first, ought his Folly to be a sufficient Plea for his throwing about Firebrands among his Fellow Subjects, or for his generously giving away a tempting Poison to every one that applies for it; and if he be not a Fool, but a Knave, as is generally the Case with these infamous Dealers, I know of no Punishment that can be too great for his Crime. Let then the additional Duty upon *English* Spirits be at least Six-Shillings a Gallon; let no Person be permitted to sell them, who has not actually served a regular Apprenticeship to the Distilling Trade

Trade for Seven Years, between the Age of 12 and 25, or who has not actually distilled at one Time, and in one Still, at least 100 Gallons of such Liquor within Six Months before such Sale, or at his last distilling, or who keeps more than one Shop, or has more than one Apprentice, under the Penalty of 100*l.* to be sued for and recovered by the Church-Wardens of the Parish in which the Person offending shall dwell, for the Use of the Parish; or in Default thereof, to be recovered of the Church-Wardens, by any Person who will sue for the same, having first given the Church-Wardens Notice of his Intention, at least eight Days before the bringing his Action. Let the Duty upon Foreign Spirits be also considerably rais'd, and let the running of them, or the buying or selling the same, knowing them to be run, or the buying or selling *English* Spirits, not having paid the Duty, knowingly, (the Evidence of which Knowledge, in either Case, to be the buying or selling them at a Price lower than the Duty thereon,) be deemed Felony, and punished with Death,

As this seems to be a proper Opportunity, I shall just take Notice of an Abuse, which has, somehow, crept into the Execution of the Excise Laws. By those Laws, the Determination of the Commissioners of Appeals is Final, and the Oath of
one

one Witness is directed to be taken, as sufficient to found an Information, or to ground a Conviction, in the Penalty incurred by any Breach of them: and because the Laws say, that any Offender shall be convicted on the Evidence of one Witness, in Prosecutions for retailing Spirituous Liquors without a Licence; where there is such Oath, no Evidence except a direct Proof of the Negative, (which, if either the Master of the Shop, or his Wife is sworn to be the Seller of any Spirituous Liquors by the Oath of an Informer, is an Impossibility, because neither his, nor his Wife's Oath can be admitted) is according to the present Practice allowed to be entered into. This surely is strangely torturing a penal Statute, which, in Reason and common Sense, could mean no more than that the positive Oath of one Witness, when unimpeached, either in Character, by Circumstances, or positive Evidence, shou'd be deemed so sufficient, as not to make any additional Evidence of the Fact necessary, and by no means can be understood to warrant a Conviction of a Man of Character, and of known Integrity, on the single Oath of an infamous hired Informer, who himself has a Share in the Penalty, and whose whole Employment is the finding out such kind of Offenders, and who has the Impudence to swear to his Drinking of more Drams in one Day, than any human Constitution can support with
Life,

Life, and at Places so distant, as he could not reach them all, tho' he rid Post, in 24 Hours. I say it is impossible to conceive, that the Oath of such a Person, and so circumstanced, shou'd have been intended by the Legislature as a sufficient Ground of Conviction, especially if there were any Circumstances, that could be made appear, to destroy the Credibility of such Oath, since as a late great Man in the Law justly observed, *Circumstances cannot be bribed, but Evidences may.*

F I N I S.



FH

**MVSEVM
BRITANNICVM**